No. 18540

United States
COURT OF APPEALS
for the Ninth Circuit

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Appellant,
vs.
RALPH SCHIEWE, BETTE SCHIEWE, his wife, and JANICE NECHANICKY,
Appellees.

RALPH SCHIEWE and JANICE NECHANICKY,
Cross-Appellants,
vs.
ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Cross-Appellee.

BRIEF OF APPELLEES AND CROSS-APPELLANTS

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

FILED

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SUBJECT INDEX

Page

Brief of Appellees

Jurisdiction 1
Opinion Below 2
Statutes Involved 3
Statement of the Case 3
Questions Presented 6
Summary of Argument 6
Argument 6
The Airplane Ran out of Gas 8
Defendant was Grossly Negligent in the Manner in which he Attempted to Check the Fuel 12
Defendant was Grossly Negligent in Causing the Airplane to Crash 15
Defendant's Gross Negligence was Properly Submitted to the Jury 20

Brief of Cross-Appellants

Statement of the Cross-Appeal 27
Specifications of Error 28
Summary of Argument 28
Argument 29
Conclusion 32

TABLE OF AUTHORITIES

Page

Cases

American Airlines v. Ulen, 186 F.2d 529 (C.A. D.C. 1949) ... 24

Bland v. Williams, 225 Or. 193, 357 P.2d 258 (1960) ... 23

Boise Payette Lumber Co. v. Larsen, 214 F.2d 373 (CA 9, 1954) ... 19

Bradfield v. Kammerrer, 225 Or. 112, 357 P.2d 278 (1960) ... 23

Brunt v. Chicago Mill & Lumber Co., 243 Miss. 607, 139 S.2d 380 (1962) ... 14, 19

Burghardt v. Olson, 223 Or. 155, 349 P.2d 792, 354 P.2d 871 (1960) ... 23

Citizens and Southern National Bank v. Huguley, 100 Ga. App. 75, 110 S.E.2d 63 (1959) ... 25

Darbrow v. McDade, 255 F.2d 610 (CA 3, 1958) ... 32

George v. Stanfield, 33 F. Supp. 486 (DC Idaho, 1940) ... 15

Grimm v. Gargis, 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957) ... 19

Herzog v. Mittleman, 155 Or. 624, 65 P.2d 384 (1937) ... 25

Holman v. Barksdale, 223 Or. 452, 354 P.2d 798 (1960) ... 23

KLM v. Tuller, 292 F.2d 775 (CA DC, 1961), cert. den. 368 U.S. 921 ... 7, 24

Lange v. Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428 (1961) ... 18

McNabb v. DeLaunay, 223 Or. 468, 354 P.2d 290 (1960) ... 23

Morris v. Williams, 223 Or. 50, 353 P.2d 865 (1960) ... 22

TABLE OF AUTHORITIES (Cont.)

Page

Nicholas v. Fennell, 184 Or. 541, 199 P.2d 905 (1948) ... 18

Nielsen v. Brown, 75 Or. Adv. Sh. 161, — Or. —, 374 P.2d 896 (1962) ... 8, 13, 24

Robart v. Brehmer, 92 C.A.2d 830, 207 P.2d 898 (1949) ... 19

Rossman v. Forman, 224 Or. 610, 356 P.2d 430 (1960) ... 23

Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952) ... 25

Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N.W.2d 902 (1952) ... 14, 15

Secanti v. Jones, 223 Or. 598, 349 P.2d 274, 355 P.2d 601 (1960) ... 23

Stites v. Morgan, 229 Or. 116, 366 P.2d 324 (1961) 23

Storm v. Thompson, 155 Or. 686, 64 P.2d 1309 (1937) ... 24

Taylor v. Lawrence, 229 Or. 259, 366 P.2d 735 (1961) ... 8, 13, 23

Tuite v. Union Pacific Stages, et al, 204 Or. 565, 284 P.2d 333 (1955) ... 18

Turner, Adm'r. v. McCready, et al, 190 Or. 28, 222 P.2d 1010 (1950) ... 7, 19

Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960) ... 14, 19

Williamson v. McKenna, 223 Or. 366, 354 P.2d 56 (1960) ... 7, 8, 13, 19, 20, 22, 23

Willoughby v. Driscoll, 168 Or. 187, 120 P.2d 768, 121 P.2d 917 (1942) ... 24

Yates v. Dann, 11 F.R.D. 386 (D.C. Del. 1951) ... 32

TABLE OF AUTHORITIES (Cont.)

Page

STATUTES AND OTHER AUTHORITIES

28 U.S.C., Sec. 1291 2

28 U.S.C., Sec. 1332 2

Federal Rules of Civil Procedure, Rule 59 (a) 31

ORS 30.120 3

3 Barron & Holtzoff, Federal Practice and Procedure,
Sec. 1304, p. 358 31
Sec. 1307, p. 383 32

2 Harper & James, The Law of Torts,
Sec. 16.9, n. 11, p. 932 14
Sec. 16.15, pp. 954-955 24

6 Moore's Federal Practice,
Sec. 59.06, p. 3759 .... 31, 32
Sec. 59.08 (5), p. 3814 .... 31, 32
Sec. 59.08 (6), p. 3821 .... 31, 32

40 Ore. Law Rev. 278 22

2 Restatement, Torts, Sec. 500 .... 20, 22

1 Willamette Law Journal, 425 25

Annotations:
86 A.L.R. 1145 15
6 A.L.R.2d 528 19
12 A.L.R.2d 656 19
29 A.L.R.2d 1199 32
74 A.L.R.2d 615 19

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Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

JURISDICTION

This is an action for personal injuries sustained by plaintiffs-appellees in an airplane crash which occurred in Klamath Falls, Oregon (R. 15). Plaintiffs are citizens and residents of the state of Washington, and defend-

ant-appellant is a citizen and resident of the state of Oregon. The matter in controversy between each of the plaintiffs and the defendant exceeds the sum of $10,000 exclusive of interest and costs (R. 15).

This case was tried by a jury and verdicts were returned and a judgment was entered in favor of plaintiff Ralph Schiewe in the amount of $1,200, plaintiff Bette Schiewe in the amount of $12,000, and plaintiff Janice Nechanicky in the amount of $2,000 (R. 26-30). Thereafter defendant filed a motion for judgment notwithstanding the verdict (R. 31-32) and plaintiffs Ralph Schiewe and Janice Nechanicky, for themselves alone, filed a motion for a new trial limited to the issue of damages or, in the alternative, a new trial on all issues (R. 34-36). The District Court denied all motions on December 19, 1962 (R. 38-39).

Defendant appealed from the judgment on January 14, 1963 (R. 40). Plaintiffs Ralph Schiewe and Janice Nechanicky cross-appealed from the judgment and from the order denying their motion for a new trial on January 16, 1963 (R. 59-60).

The District Court had jurisdiction under 28 U.S.C. Sec. 1332, as amended, and this Court has jurisdiction under the provisions of 28 U.S.C., Sec. 1291, as amended.

OPINION BELOW

The judgment of the District Court was entered without opinion upon the verdicts of the jury. The District Court rendered an oral opinion on December 17, 1962, denying defendant's motion for judgment notwithstand-

ing the verdict and the motion of plaintiffs Ralph Schiewe and Janice Nechanicky for a new trial. This oral opinion is reported in the transcript (Tr. 352-356).

STATUTES INVOLVED

ORS 30.120

> "No person transported by the owner or operator of aircraft as his guest without payment for such transportation shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others."

STATEMENT OF THE CASE

This is an action by three plaintiffs against the defendant to recover damages for personal injuries sustained as the result of an airplane crash on August 14, 1959, at Kingsley Field in Klamath Falls, Oregon (R. 15).

Plaintiff Ralph Schiewe and plaintiff Bette Schiewe are husband and wife (Tr. 8). Plaintiff Janice Nechanicky is the sister of Ralph Schiewe (Tr. 12). The defendant is the half-uncle of plaintiff Bette Schiewe (Tr. 65).

Defendant was the owner and operator of the Klamath Aircraft Service located at Kingsley Field in Klamath Falls, Oregon, and the owner and operator of the airplane involved in this accident (R. 15, Pltf. Ex. 6, Tr. 292). The airplane is described as a single engine

Piper Comanche, Model PA 24-180, Registration No. N-5740 P (Pltf. Ex. 6; Def. Ex. 5, 9).

Defendant had invited the plaintiffs to go for a ride in his airplane and they were guests of the defendant at the time of the crash (Tr. 14). An aircraft guest passenger statute was in effect in Oregon at this time (Br. 3).

As stated by the defendant, the District Court submitted seven specifications of gross negligence and reckless disregard of the rights of the plaintiffs to the jury. These specifications were as follows:

3. In operating and flying said airplane without sufficient gasoline in the left fuel tank.

4. In failing to properly determine the amount of gasoline in the left fuel tank.

5. In attempting to check the amount of gasoline in the left fuel tank without the aid of lights or a measuring device.

9. In failing to switch from the left fuel tank to the right fuel tank when the engine failed or commenced to fail.

10. In failing to lower the nose of said airplane when the engine failed or commenced to fail.

11. In failing to maintain a straight glide path.

12. In attempting to turn said airplane to the left at a time when the engine thereof had failed or had commenced to fail.

(R. 16-17; Tr. 316-317).

All of the plaintiffs received compression fractures of the low back together with other injuries as a result of this crash (R. 17-19; Popp Dep. 5-6, 55-58, 72-76; Rodney Dep. 6). The injuries were permanent and resulted in permanent disability (Popp Dep. 38, 61, 70, 75).

After receiving instructions as to the applicable law, the jury found defendant guilty of gross negligence and reckless disregard of the rights of the plaintiffs and awarded plaintiff Bette Schiewe the sum of $12,000, plaintiff Ralph Schiewe the sum of $1,200, and plaintiff Janice Nechanicky the sum of $2,000 (R. 26-30). After judgment was entered, the defendant filed a motion for judgment notwithstanding the verdict (R. 31-32), and Ralph Schiewe and Janice Nechanicky filed a motion for a new trial limited to the issue of damages or, in the alternative, on all issues on the grounds that the verdicts were inadequate and against the clear weight of the evidence as to damages (R. 34-36). Plaintiff Bette Schiewe did not file a motion for a new trial. The District Court denied all motions (R. 38-39).

Plaintiffs Ralph Schiewe and Janice Nechanicky have cross-appealed from the judgment and from the order denying their motion for a new trial (R. 59-60). This brief combines the appellees' answering brief and the opening brief of cross-appellants Ralph Schiewe and Janice Nechanicky. The cross-appeal is considered infra (Br. 27-32).

QUESTIONS PRESENTED

We believe that the only question involved in this appeal is whether there was sufficient evidence of gross negligence or reckless disregard of the rights of the plaintiffs to submit this case to the jury.

SUMMARY OF ARGUMENT

1. An issue of fact was presented as to whether defendant was guilty of gross negligence or reckless disregard of the rights of the plaintiffs.

2. There was sufficient evidence to submit this case to the jury in that the evidence showed that defendant was guilty of gross negligence and reckless disregard of the rights of the plaintiffs in operating the airplane without sufficient gasoline and in causing the airplane to crash.

ARGUMENT

This is an aggravated case of gross negligence and reckless conduct. The evidence clearly showed that the defendant operated this airplane without sufficient gasoline in the left fuel tank and made a wholly inadequate inspection to determine the presence or absence of fuel prior to the flight (Br. 8-15). The evidence shows that such examination was made in a condition of dusk or darkness, without a light and without any type of measuring device (Pltf. Ex. 7, 8; Tr. 15-17, 70-71, 117-118, 148). The evidence further shows that this casual examination of the fuel supply was made when the defendant

knew that the left fuel gauge was defective (Tr. 22-23, 118).

The evidence in this case further shows that the defendant took no care or precaution whatsoever to prevent the airplane from crashing after it ran out of fuel and failed to use the slightest care in order to safely land the airplane. It was clearly shown that he failed to take the most elementary steps necessary for the safety of the airplane, such as changing from the left fuel tank to the right fuel tank or lowering the nose of the airplane to maintain air speed or in merely landing the airplane which was then directly over the runway (Br. 15-19). Instead the defendant did the very thing which is condemned by all pilots as improper—he turned the airplane away from the runway and caused it to stall and crash (Pltf. Ex. 31; Tr. 27, 30, 101, 150, 201, 222-223).

It seems to the appellees that the question before the Court is simply whether there was any evidence to support the verdict of the jury. In deciding this question, it is, of course, well established that the evidence must be considered in the light most favorable to the party who received the verdict of the jury and they should be given the benefit of every reasonable inference that can be drawn from the evidence in their favor. *KLM* v. *Tuller,* 292 F.2d 775 (CA DC, 1961), *Turner, Adm'r.* v. *McCready, et al,* 190 Or 28, 55, 222 P.2d 1010 (1950).

We submit that an examination of the record will indicate that the defendant has primarily been arguing facts and inferences to be drawn from facts. We also believe that the defendant has misconstrued *Williamson* v. *Mc-*

Kenna, 223 Or 366, 354 P.2d 56 (1960) as requiring subjective proof of a reckless state of mind. It is clear that an objective rather than a subjective standard should be applied. *Williamson* v. *McKenna,* supra, at 396-398; *Taylor* v. *Lawrence,* 229 Or 259, 366 P.2d 735 (1961); *Nielsen* v. *Brown,* 75 Or. Adv. Sh. 161, — Or. —, 374 P.2d 896 (1962).

The Airplane Ran out of Gas

Defendant has argued that there was no evidence that the left fuel tank was empty (App. Br. 29). The record does not sustain defendant's position.

Defendant primarily relies on the flight and fuel records. He claims that they established that the airplane had been flown less than two hours since both tanks were filled (App. Br. 29).

The only difficulty with this argument is that the jury undoubtedly did not believe that the records were correct. The fuel records (Def. Ex. 8-A) were in a very unsatisfactory condition. An entry had been squeezed in above the gas entry of August 12, 1959, and there was some question about its authenticity (Tr. 268-270). The employee in charge of the gasoline could not even identify the entry as being in his handwriting (Tr. 269).

The daily flight records were more suspicious (Def. Ex. 8-B). The airplane involved in this crash is identified as PA 24 and as 5740P. The entries are completely out of order in that they show flight time of this airplane on August 11th, August 12th, then on August 13th, then an entry on August 12th for a pilot by the name of Gor-

don which apparently refers to this airplane, then another entry for August 13th, then two more entries back to August 12, 1962 for this airplane.

The last entry was for a flight by the defendant which showed 7 hours and 50 minutes of flight time. The defendant attempted to explain this entry by stating that he had flown the airplane a week prior to this date (Tr. 299). The entries otherwise appear to be in order except for the crucial time immediately prior to the crash. The jury was entitled to give little credence to these records.

There was little doubt that this airplane ran out of gas. The witnesses testified that "the engine started to sputter" (Tr. 26), it "began to sputter and cough." (Tr. 72), and "then there was a coughing and sputtering sound" (Tr. 118). The engine sounded like an engine running out of gas (Tr. 28, 72).

One of the defendant's employees testified: "The engine kept running spasmodically, like it would get a shot of fuel and then none, and then another shot" (Tr. 100). When the engine commenced to fail, the defendant kept pumping the throttle (Tr. 26, 51, 149). Mr. Withers, a flight instructor employed by the defendant, testified that he was the last one to fly the airplane before the crash (Tr. 254). He testified that he did not know whether he ran the left tank down or not and that it was possible that he had run it almost empty (Tr. 254).

Two employees of the defendant (McNeal and Burton) arrived at the scene of the crash within 10 or 15 minutes after it occurred (Tr. 113, 206). The tank se-

lector was pointed to the left fuel tank and the left fuel tank was dry (Tr. 204-205).

Both employees observed a small amount of gasoline dripping from the edge of the wing. "The dripping was very, very little." (Burton, Tr. 105). "A very small amount of gasoline dripping off the end of the wing . . ." (McNeal, Tr. 206).

There was a wet spot on the ground about 5 or 6 inches wide and 15 to 18 inches long (Tr. 105, 206). The ground was not saturated or puddled (Tr. 105). There was such a small amount of gasoline that there was hardly any smell (Tr. 207).

It was determined that there was a small cut or slit in the left fuel tank. Mr. Christenson, the FAA investigator, testified that it was about 2 inches long and in the nature of a slit as might occur in a rubber tube (Tr. 144). The cut was caused by impact damage (Pltf. Ex. 7, Tr. 212-214).

The fuel tank was left in the possession of the defendant (Tr. 145). It was later altered by an insurance adjuster employed by defendant's insurance company (Tr. 4-6). McNeal testified that an investigator for the defendant lengthened the slit in the tank with a knife and also cut two holes in it (Tr. 214-215).

McNeal had been employed by the defendant as an aircraft mechanic and a foreman for approximately 11 years (Tr. 197). He was a licensed air engine and frame mechanic and also a pilot (Tr. 197). He testified that he looked into the left fuel tank immediately after the crash

because it was his opinion that the engine had quit from lack of fuel (Tr. 205).

After the crash, Mr. McNeal removed the carburetor from the airplane and found that it only contained one teaspoonful of unusable gasoline whereas it should have contained approximately a cup (Tr. 210-211). The carburetor was in good condition and no fuel could have leaked from it (Pltf's Ex. 26, Tr. 141-142, 209-211). There was nothing wrong with the airplane which would have prevented gasoline from getting to the carburetor (Tr. 211-212).

The airplane was new and in perfect condition prior to the crash (Def. Ex. 6, Tr. 114, 216, 286). After the crash, it was determined that the fuel lines were undamaged and that the fuel pumps operated properly (Tr. 142, 212). The FAA investigator could not find any evidence of malfunction of equipment or mechanical failure (Pltf. Ex. 7, Tr. 150).

Mr. McNeal could not find any mechanical cause for the failure of the airplane (Tr. 216). It was his opinion that it had run out of fuel (Tr. 205, 217; see also, Schiewe, Tr. 8-9, 60). Mr. McNeal could find no other cause for the engine failure (Tr. 217).

In view of this evidence the jury was not only entitled to infer that the airplane ran out of gasoline but there was direct and positive testimony that it did, in fact, run out of gasoline.

Defendant was Grossly Negligent in the Manner in which he Attempted to Check the Fuel

The defendant and the plaintiffs arrived at the airport at about 7:15 p.m. or somewhere between 7:00 and 7:30 p.m. (Tr. 15, 70, 117). Sunset occurred in Klamath Falls at 7:09 p.m. (Pltf. Ex. 8). The aircraft was cleared to taxi at 7:41 p.m. and was cleared to takeoff at 7:51 p.m. (Pltf. Ex. 7, Tr. 149).

When the defendant and the plaintiffs arrived at the airport "It was dusk. It was getting dark." (Tr. 15); "Well, it was getting dark quite fast by that time." (Tr. 70). The runway lights and lights in the various buildings were on (Tr. 71, 118).

According to the FAA investigation, the defendant checked the gasoline in the left fuel tank approximately 20 minutes after sundown (Pltf. Ex. 7, Tr. 148). In addition, the airplane was wheeled out in front of a hangar where it was in a shadow (Tr. 16).

The gas tank opening is a foot or so back from the edge of the wing (Tr. 17). The opening consists of a small metal door and then there is an inner cap similar to a cap on a thermos bottle (Tr. 17). A filler neck then leads into the gas tank (Tr. 288). The top of the tank opening is illustrated by defendant's Exhibits 4-C to 4-G.

Defendant attempted to check the amount of gasoline in the left fuel tank by merely looking into it (Tr. 16-17). He did not use a light or a measuring device or his finger (Pltf. Ex. 7, Tr. 17, 148). The defendant did not check the fuel in the right fuel tank (Tr. 19-20).

The customary practice is to use some sort of a measuring device to check the level of the gasoline (Tr. 18-19). It is impossible to measure the distance in the gas tank by looking down into the hole (Tr. 19, 46). The level of the fuel can be misleading unless you have a good light (Tr. 227-228). Defendant's witness Withers testified that the usual practice when it is dark or dusk is to check the fuel by using a flashlight or possibly your finger (Tr. 253-254).

The jury was entitled to conclude that this casual inadequate check of the gasoline was made by the defendant at a time when he had had knowledge that the left fuel tank was defective (Tr. 22-23, 118). The jury, of course, was further entitled to find that there was in fact such a small amount of gasoline in the left fuel tank that the engine failed almost immediately after takeoff (Br. 8-11).

Defendant has taken the position that there was no duty on the part of the defendant to inspect and he has cited a number of automobile cases (App. Br. 22-24). Defendant argues that the basis of liability is not what he should know but what he actually knows and fails to tell his guests (App. Br. 22).

This is not the Oregon rule. It is not necessary that the defendant actually know of the risk. If the danger is obvious, he will presumed to have been aware of it. The standard is an objective one and the state of mind may be inferred. *Williamson* v. *McKenna,* 223 Or. 366, 396-398, 354 P.2d 56 (1960); *Taylor* v. *Lawrence,* 229 Or. 259, 366 P.2d 735 (1961); *Nielsen* v. *Brown,* 71 Or. Adv. Sh. 161, — Or —, 374 P.2d 896 (1962).

The automobile cases cited by the defendant involve various factual circumstances which are not similar to the facts involved in the present case. They do not apply where there is active negligence. They could only possibly be applicable to a situation where there is a mechanical defect which is unknown to the defendant. Such is not the case here.

It is obvious that the duty to inspect depends upon the circumstances and the degree of danger involved. 2 Harper & James, The Law of Torts, Sec. 16.9, n. 11, page 932. The operation of aircraft calls for a greater degree of care than the operation of other instrumentalities. *Brunt* v. *Chicago Mill & Lumber Co.*, 243 Miss. 607, 139 S.2d 380, 383 (1962). As was stated in *Walthew* v. *Davis,* 201 Va. 557, 111 S.E.2d 784 (1960):

> "What would be slight negligence in the operation of an automobile might be gross negligence with disastrous results in the operation of an airplane. A guest displeased with and alarmed at his host's negligent operation of an automobile may get out and take to the highway on foot. A guest in an airplane has no such election, but must suffer the consequences of his host's negligence which is frequently fatal." (111 S.E.2d at 786.)

Defendant surely cannot be contending that there is no duty to determine whether an airplane has gasoline in it before flight. The circumstances are entirely different from attempting to drive an automobile without gasoline and in attempting to fly an airplane without fuel.

In *Scarborough* v. *Aeroservice, Inc.,* 155 Neb. 749, 53 N.W.2d 902 (1952), an airplane crashed because of an excessive amount of water in the tail of the airplane.

Defendant was charged with negligence in failing to inspect before the flight. The court stated:

> "The evidence disclosed a tail-heavy condition (water) in this plane which could and did result in a serious accident. This type of inspection is just as important as ascertaining the sufficiency of the fuel and oil, and the operation of the engine." (53 N.W.2d at 909)

The defendant even knew that the gasoline gauge was defective (Tr. 22-23, 118). This should have put him on notice that he would have to exercise more care in determining the amount of gasoline in the tank. See *George* v. *Stanfield,* 33 F. Supp. 486 (DC Idaho, 1940) applying the Oregon automobile guest passenger statute; and Annotation, 86 A.L.R. 1145 at 1148.

Defendant was Grossly Negligent in Causing the Airplane to Crash

The parties apparently boarded the airplane at approximately 7:41 p.m. (Tr. 71, 149). Mrs. Schiewe and Miss Nechanicky sat in the rear seat and the men sat in the front seats (Tr. 20, 71).

Defendant insisted that Mr. Schiewe sit in the left seat of the airplane where the pilot usually sits (Tr. 20-21). The pilot normally sits in the left seat because the more important instruments are located on the left side of the instrument panel and most people are right-handed (Tr. 21, 221). The flight instruments on this particular airplane were on the left side (Tr. 284).

Defendant has stated in his brief that both Mr. Schiewe and the defendant were pilots (App. Br. 6). Mr.

Schiewe received his license in 1948 and it expired and ceased to be valid one year later, in 1949, because he did not fly enough (Tr. 10-11). Ralph Schiewe had only flown three or four times since 1949 (within ten years) in private airplanes (Tr. 11). Defendant was the owner and operator of the Klamath Aircraft Service and had been a pilot for approximately 20 years (R. 15, Tr. 14, 271). The experience and knowledge of Mr. Schiewe and the defendant were hardly comparable.

The defendant took off and although he had contended otherwise in the Pre-Trial Order, he admitted that he was the pilot at the controls and was flying the airplane (R. 20; Pltf. Ex. 6; Tr. 25, 150, 292).

After the airplane had gained an altitude of 75 to 100 feet and had an air speed of about 95 miles an hour, the engine commenced to sputter and miss like it was running out of gasoline (Tr. 26, 28, 72, 100).

The portion of the runway being used by the defendant was about 6,000 feet long with an additional gravel overrun of approximately 1,000 feet (Tr. 202). When the engine first started to miss, there was 4,000 feet of runway in front of the defendant (Tr. 202). When the engine finally quit, there was still 1,500 to 2,000 feet of runway in front of the defendant (Tr. 203). See Plaintiff's Exhibit 31 and the testimony of Mr. McNeal for the various positions of the airplane prior to the crash (Tr. 200-202).

According to the Owner's Manual, the airplane can land in 600 feet (Def. Ex. 5, p. 5). Defendant was directly over the runway all of the time that the engine was

missing and was still over the runway when the engine quit (Pltf. Ex. 31, Tr. 27, 150). There was no reason why he could not have landed the airplane on the runway (Tr. 203).

The Owner's Manual, Defendant's Exhibit 5, page 29, states:

> "Engine Failure:
> The most common cause of engine failure is mismanagement or malfunction of the fuel system. Therefore, the first step to take after engine failure is to move the fuel selector valve to the tank not being used. This will often keep the engine running even if there is no apparent reason for the engine to stop on the tank being used."

The defendant did not change the fuel selector valve although it is located between the seats and is easy to reach (Def. Ex. 4-B, Tr. 26, 60, 149). A reasonably prudent pilot would have changed the fuel selector valve to the right tank (Tr. 29). The defendant knew that if you switch to another tank, the engine will start (Tr. 293).

An airplane can still fly with the engine stopped if air speed is maintained (Tr. 225). It will stall when the wings cannot produce enough lift to keep it flying (Tr. 225). It is necessary to maintain air speed to prevent a stall and to permit the airplane to glide (Tr. 27-28, 223).

Instead of lowering the nose and maintaining air speed, the defendant kept the airplane in a "nose-high attitude" (Tr. 26-27, 100-102, 201). It should have been in a "nose-down attitude" (Tr. 201). A reasonable prudent pilot under these circumstances would have lowered the nose and maintained his air speed (Tr. 29, 222-223).

When the engine finally quit, the defendant turned the airplane sharply to the left causing it to stall and crash (Pltf. Ex. 31, Tr. 27, 30, 101, 150, 201). He should have attempted to land straight ahead (Tr. 222). It was not reasonable or prudent to attempt a turn at that altitude (Tr. 30, 223). Pilots are trained not to turn when the engine quits (Tr. 60-61).

Defendant states in his brief that he did everything he could to save the plane, including himself and his passengers (App. Br. 28). The evidence indicates that he did everything absolutely wrong and in utter disregard of the safety of the airplane and its occupants.

Defendant claims that his conduct at the time that the engine commenced to fail should be considered as an inadequate response to an emergency (App. Br. 28). In the first place, these circumstances are not so unusual that a pilot should not properly respond. Pilots are trained to react and perform these procedures in this type of a situation (Tr. 60-61, 225).

In the second place, the jury was instructed on defendant's theory of an emergency and they found against the defendant on this issue (Tr. 326-327). This was at most a fact question. Moreover, a person cannot invoke the emergency doctrine if the emergency is created by his own negligence. *Nicholas* v. *Fennell,* 184 Or. 541, 552, 199 P.2d 905 (1948), *Tuite* v. *Union Pacific Stages, et al,* 204 Or. 565, 596, 284 P.2d 333 (1955).

An inference of negligence is usually created when the evidence tends, as in this case, to exclude all causes other than human fault for an airplane crash. *Lange* v.

Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428 (1961), was quite similar to this case in that the weather was good and there was no evidence of malfunction or mechanical failure. The Court held that an inference of negligence was created which was sufficient to sustain a verdict for the plaintiff. This Court has held substantially the same in *Boise Payette Lumber Co.* v. *Larsen,* 214 F.2d 373 (CA 9, 1954). See also Annotation, 6 A.L.R.2d 528 "Res ipsa loquitur in aviation accidents".

A higher degree of care is required in the operation of aircraft than in the operation of land or water vehicles. *Walthew* v. *Davis,* 201 Va. 557, 111 S.E.2d 784 (1960); *Brunt* v. *Chicago Mill & Lumber Co.,* 243 Miss. 607, 139 S.2d 380, 383 (1962). A pilot may be guilty of negligence in the operation of an airplane on take-off. *Robart* v. *Brehmer,* 92 C.A.2d 830, 207 P.2d 898 (1949), Annotation 74 A.L.R.2d 615. He may also be guilty of negligence in failing to follow correct procedure when an airplane is approaching a condition of stall. *Grimm* v. *Gargis,* 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957). See also, Annotation 12 A.L.R.2d 656 "Liability for Injury to Guest in Airplane."

The acts and conduct of the defendant, taken individually or as a series of negligent acts, could properly be considered by the jury as amounting to gross negligence under all of these circumstances. *Williamson* v. *McKenna,* 223 Or. 366, 400, 354 P.2d 56 (1960), *Turner, Adm'r* v. *McCready, et al.*, 190 Or. 28, 54, 222 P.2d 1010 (1950).

Defendant's Gross Negligence was Properly Submitted to the Jury

The Trial Court properly applied Oregon law in submitting this case to the jury.

There are no decisions in Oregon interpreting the aircraft guest passenger statute but there are a number of cases interpreting the automobile guest passenger statute. Although the application of the facts to the law would probably not be the same in cases involving aircraft because of the increased risk, the general principles of the automobile guest passenger statute would probably apply.

The defendant has analyzed *Williamson* v. *McKenna,* 223 Or. 366, 354 P.2d 56 (1960), in some detail. In this case a guest passenger brought an action for damages for injuries sustained in a collision which was the result of the host driver attempting to make a left turn at a Y-intersection.

The Oregon court re-examined the automobile guest passenger statute and held that gross negligence, as used in this statute, means reckless conduct as defined in 2 Restatement, Torts, Section 500. The Court further defined the character of reckless conduct in more detail as follows:

1. The defendant must intentionally do the act or intentionally fail to do the act which involves the risk.

> The Court stated that this does not mean that the defendant intended to cause the harm. Reckless conduct involves the choosing of a course of action

which spells danger. The choice of action is not necessarily a real mental operation but may be inferred from manifestly dangerous conduct (at 395-396).

2. The defendant's conduct must involve a high degree of probability that harm will result.

The Court stated that this is merely another way of saying that the conduct is dangerous. The strong probability that harm will result is, of course, the probability which is or should be apparent to the defendant (at 396).

3. It is not necessary that defendant actually know of the risk.

The Court stated that if the danger is obvious, the defendant will be presumed to have been aware of it. Recklessness may be found in circumstances where the defendant did not appreciate the extreme risk but where any reasonable man would appreciate it. The element of recklessness may, under some circumstances, be inferred from evidence of the driver's conduct in the light of conditions and of what he must have known. The standard is an objective one as it is in the case of negligence (at 396-399).

4. Defendant's actual consciousness of the risk, although not necessary to prove reckless conduct, may be a significant factor in establishing his liability (at 399).

5. Inadvertent conduct, without more, will not constitute recklessness.

The Court is referring to momentary thoughtlessness (at 399-400).

6. A series or combination of negligent acts may constitute reckless conduct if taken together they indicate the so-called reckless state of mind.

> The Court stated that a combination of negligent acts may be sufficient to make out a case of gross negligence (at 400-401).

We submit that the most important consideration is whether the conduct in question involves a high degree of probability that harm will result. 40 Ore. Law Rev. 278, 280. Only exceptional circumstances can make it reasonable to adopt a course of conduct which involves a high degree of risk and serious harm to others, and such conduct cannot be justified unless it is of great social value. Comment a, Restatement, Torts, Sec. 500.

This case is well within the rule set forth in *Williamson* v. *McKenna.* The conduct of the defendant involved a high degree of probability that harm would result. It involved the choosing of a course of action which spelled danger and the defendant must be presumed to have been aware of it. Any reasonable man would have appreciated the risk and the element of recklessness can be inferred from the evidence of defendant's conduct in the light of these conditions and what he must have known.

Subsequent Oregon cases cited by the defendant are in no way similar to the case at bar. These cases merely involve situations where the defendant was driving at the indicated speed on a rainy night and was temporarily blinded by the lights of an oncoming vehicle. (*Morris* v. *Williams,* 223 Or. 50, 353 P.2d 865 (1960); where de-

fendant's vehicle went out of control after rounding a curve on the highway (*Burghardt* v. *Olson*, 223 Or. 155, 349 P.2d 792, 354 P.2d 871 (1960); where there was merely speed on entering a curve (*Holman* v. *Barksdale*, 223 Or. 452, 354 P.2d 798 (1960); where the cause of the collision was the failure of the defendant to see a flagman (*McNabb* v. *DeLaunay*, 223 Or. 468, 354 P.2d 290 (1960); where defendant drove his automobile through a stop sign (*Secanti* v. *Jones*, 223 Or. 598, 349 P.2d 274, 355 P.2d 601 (1960); where the only evidence of reckless conduct was speed based on evidence of an experiment and an inference of failure to keep a lookout (*Bradfield* v. *Kammerrer*, 225 Or. 112, 357 P.2d 278 (1960); where the defendant attempted to adjust his radio and the wheels of his automobile went into a ditch (*Bland* v. *Williams*, 225 Or. 193, 357 P.2d 258 (1960); and where defendant turned around when someone hollered and lost control of his automobile (*Stites* v. *Morgan*, 229 Or. 116, 366 P.2d 324 (1961).

None of these cases involve a situation comparable to the circumstances involved in this case. The Oregon Supreme Court has held that gross negligence was a question for the jury in a case less aggravated than the present one. *Rossman* v. *Forman*, 224 Or. 610, 356 P.2d 430 (1960).

Throughout defendant's brief he has argued defendant's state of mind from a subjective standpoint. It is clear that the Oregon test is an objective one. *Williamson* v. *McKenna*, supra (at 396-399). In *Taylor* v. *Lawrence*, 229 Or. 259, 366 P.2d 735 (1961), the Court held that it was error to require the plaintiff to prove that the

defendant consciously was unconcerned. The Court repeated that the test was an objective one (at 265). See also, *Nielsen* v. *Brown,* 75 Or. Adv. Sh. 161, — Or. —, 374 P.2d 896 (1962), where the Court held that error could be committed unless it was made clear to the jury that an objective test was to be applied.

No particular state of mind should be required for a finding of reckless or wanton misconduct. 2 Harper & James, The Law of Torts, Sec. 16.15, p. 954-955.

In airplane cases it has been held to be sufficient evidence of willful misconduct under the Warsaw Convention to have a flight plan which is less than 1,000 feet above the highest obstacle on the course. *American Airlines* v. *Ulen,* 186 F.2d 529 (C.A. D.C. 1949). In *KLM* v. *Tuller,* 292 F.2d 775 (C.A. D.C. 1961), cert. den. 368 U.S. 921, the Court held that there was evidence of willful and wanton misconduct in failing to properly instruct passengers as to life vests, in failing to broadcast an emergency message, and in failing to initiate prompt rescue operations.

It has long been the rule in Oregon that the guest passenger statute is in derogation of the common law and must be strictly construed. *Willoughby* v. *Driscoll,* 168 Or. 187, 120 P.2d 768, 121 P.2d 917 (1942).

It has also long been the rule in Oregon that where the facts are such that reasonable minds may differ as to whether there was gross negligence, it is a question of fact for the jury and not one of law for the Court. *Storm* v. *Thompson,* 155 Or. 686, 64 P.2d 1309 (1937),

Herzog v. *Mittleman,* 155 Or. 624, 65 P.2d 384 (1937). See also, 1 Willamette Law Journal, 425 at 439.

The question of whether a gross negligence case should be submitted to the jury is basically no different from any negligence case. If reasonable minds might differ as to whether certain conduct constitutes gross negligence, then the question should be one of fact for the jury.

It has been so held in Georgia where an aircraft guest passenger is required to prove gross negligence. *Sammons* v. *Webb,* 86 Ga. App. 382, 71 S.E.2d 832 (1952), *Citizens and Southern National Bank* v. *Huguley,* 100 Ga. App. 75, 110 S.E.2d 63 (1959).

In the *Sammons* case, the defendant attempted to land the airplane on a roadway at dusk and struck a guy wire. The Court held that the question of whether the defendant was guilty of gross negligence was for the jury and stated:

> "It is also a jury question where reasonable minds might disagree as to whether the negligence charged is ordinary or gross, or so charged with reckless disregard of consequences as to amount to wanton misconduct." (71 S.E.2d at 840)

The Trial Court concluded that there was sufficient evidence of reckless conduct to submit this case to the jury (Tr. 305, 306). The Trial Court again reviewed this case in connection with defendant's motion for judgment notwithstanding the verdict and stated:

> ". . . if this defendant was as casual about looking at the gasoline in the tank as some of the evidence would indicate, and which the jury was entitled to

believe, it seems to me that it would be about the same thing as a man going around with a loaded gun with the safety off (Tr. 352).

"The evidence is undisputed that the thing to do would be to point the nose down and make a normal landing on the runway. In place of doing that, or instead of reaching down and doing what should be a normal reaction of any experienced pilot, turning to the other gas tank, or attempting to land in a normal way, he took the very action that is condemned by all the rules: that is, when the wings had lost their lifting power he made a left turn which of course destroyed what little lifting power remained, and there was a crash. For an expert pilot to make that maneuver when he knows, under his own testimony, that the motor is quitting, could, I believe, be viewed by the jury as evidence of gross negligence." (Tr. 353-354)

The jury was entitled to find gross negligence under the evidence in this case.

BRIEF OF CROSS-APPELLANTS RALPH SCHIEWE AND JANICE NECHANICKY

STATEMENT OF THE CROSS-APPEAL

A statement of the pleadings and facts disclosing the jurisdiction of the District Court and the jurisdiction of this Court is set forth in appellees' jurisdictional statement (Br. 1-2).

As a result of the airplane crash, all of the plaintiffs sustained compression fractures of the low back (Popp Dep. 5-6, 55-58, 72, 74-76). The medical testimony was undisputed that the injuries were permanent (Popp. Dep. 38, 61, 70, 75). The jury returned a verdict for plaintiff Bette Schiewe in the amount of $12,000 and verdicts for Ralph Schiewe for $1,200, and Janice Nechanicky for $2,000 (R. 26-28).

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky moved the Court for an order granting these plaintiffs a new trial against the defendant limited to the issue of damages, or, in the alternative, a new trial on all issues on the grounds that the verdicts were inadequate and were against the clear weight of the evidence as to damages (R. 34-36). The motion for a new trial was denied (R. 38-39) and plaintiff Ralph Schiewe and Janice Nechanicky cross-appealed from the judgment and the order denying their motion for a new trial (R. 59-60).

The question involved on the cross-appeal is whether

the damages awarded to plaintiff Ralph Schiewe and Janice Nechanicky were so inadequate that they are entitled to a new trial. If this Court determines that they are entitled to a new trial, a secondary question is presented as to whether they are entitled to a new trial limited to the issue of damages or a new trial on all issues.

SPECIFICATIONS OF ERROR

1. The verdicts in favor of plaintiffs Ralph Schiewe and Janice Nechanicky were against the clear weight of the evidence as to damages and constituted an improper and inadequate award of damages.

2. The Trial Court erred in denying the motion of plaintiffs Ralph Schiewe and Janice Nechanicky for a new trial against the defendant limited solely to the issue of damages or, in the alternative a new trial on all issues.

SUMMARY OF ARGUMENT

I

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky are entitled to a new trial because the damages awarded to them are clearly inadequate and reasonable minds could not differ that their damages were far in excess of the amount awarded.

II

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky are entitled to a new trial limited to the issue of damages.

ARGUMENT

Bette Schiewe sustained a compression fracture of L-1 as a result of the airplane crash (Popp Dep. 5-6). A fusion was subsequently performed by Dr. Popp (Popp Dep. 24, Pltf. Ex. 14-A, B). The jury awarded Mrs. Schiewe the sum of $12,000.00.

Ralph Schiewe sustained a severe compression fracture of the 11th dorsal vertebra (Popp Dep. 55-58). This resulted in a natural fusing of three vertebrae in his back (Tr. 172-173). He had special damages of $685.80 (Tr. 36-38, 230, 310, 318). The jury awarded him the sum of $1,200.00 or general damages in the amount of $514.20.

Janice Nechanicky sustained a compression fracture of the first and second lumbar vertebra with some question as to a fracture of a third vertebra (Rodney Dep. 6, Popp Dep. 72, 74, 76). She incurred special damages in the amount of $827.85 (Tr. 123-124, 311, 319). The jury awarded her $2,000.00, or general damages in the amount of $1,172.15.

The verdict in favor of Bette Schiewe in the amount of $12,000.00 was low but reasonable minds could differ as to whether this was a proper amount. The verdicts in favor of Ralph Schiewe and Janice Nechanicky for substantially the same injuries were completely unreasonable and inadequate and we submit that reasonable minds could not differ that they were damaged far in excess of the amount awarded.

Plaintiff Ralph Schiewe was in the Klamath Valley

Hospital and the Bremerton Naval Hospital and was in a full body cast for approximately two months (Tr. 32-33). He sustained a compression fracture of the eleventh dorsal vertebra (Popp Dep. 55) and lost two teeth (Tr. 32). He left the Naval Hospital on leave approximately two and one-half months after the crash occurred (Tr. 33). He was not able to resume his normal job as a mechanic until April of 1960 (Tr. 34-35).

The Navy paid most of his medical bills and most of his lost wages but he did have special damages in the amount of $685.80 (Tr. 35-38, 230, 318). He was 36 years of age at the time of trial (Tr. 8) and had a life expectancy of 36 years (Tr. 327). His injuries resulted in limitation of his capacity to work and his general activities (Tr. 39-42). The injury to his back was described as a severe compression fracture of the eleventh dorsal vertebra with marked wedging or compression (Popp Dep. 55, 57). The entire body of D-11 sustained the fracture and there was a loss of 60 to 70% of vertical height in the vertebra (Popp Dep. 58). He sustained a permanent disability (Popp Dep. 61, 70).

Dr. Engelcke, defendant's examining doctor, was in substantial agreement. He testified that the vertebra was severely compressed and it resulted in a fusing of two other vertebrae to the vertebra which sustained the compression fracture (Tr. 166-167, 172-173). He testified that the vertebra was squashed about 50% (Tr. 172). He further testified that Mr. Schiewe sustained a permanent disability of 15% of the body considering the body as a whole (Tr. 171).

At the time of trial Janice Nechanicky was 23 years of age (Tr. 115) and had a life expectancy of 56 years (Tr. 327). She was in a full body cast for five or six weeks and was in a brace thereafter (Tr. 121-122). She sustained medical expenses and wage loss in the amount of $827.85 (Tr. 124, 311, 319). Her injuries also resulted in a limitation of activities (Tr. 124-125).

Medical testimony indicated that she sustained a compression fracture of the first and second lumbar vertebrae and possibly the twelfth thoracic vertebra (Rodney Dep. 6; Popp Dep. 72, 74). The first lumbar vertebra was compressed to one-half of its normal size (Rodney Dep. 9). She sustained a permanent injury (Rodney Dep. 13) and a permanent partial disability of 20% (Popp Dep. 75).

The Court may order a new trial on all or part of the issues and as to all or any of the parties. Rule 59 (a), Federal Rules of Civil Procedure, 6 Moore's Federal Practice, Sec. 59.06, p. 3759. The Trial Court may order a new trial when the verdict is against the weight of the evidence or when the damages awarded are inadequate. 6 Moore's Federal Practice, Sec. 59.08 (5), (6), p. 3814, 3821; 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1304, p. 358.

The Court would seem to have the same power to order a new trial when the damages are inadequate as when the damages are excessive. If the damages shock the conscience of the Court, the verdict should be set aside and a new trial should be granted.

We believe that general damages in the amount of

$514.20 and $1,172.15 for compression fractures of the back and permanent disability are so unreasonable and so inadequate that justice was not done. We also believe that reasonable minds could not differ and that a new trial should be granted.

In this case liability has already been determined by the jury and the issue of damages is not interwoven with the issue of liability. Under such circumstances, a new trial should be limited to the issue of damages alone. *Yates* v. *Dann,* 11 F.R.D. 386, (D.C. Del. 1951); *Darbrow* v. *McDade,* 255 F.2d 610 (C.A. 3, 1958); Annotation, 29 A.L.R.2d 1199 "New Trial as to Damages Only", 6 Moore's Federal Practice, Sec. 59.06, p. 3759, Sec. 59.08, (6), p. 3821, 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1307, p. 383.

If the damages are considered to be in some manner interwoven with the issue of liability, plaintiff Ralph Schiewe and plaintiff Janice Nechanicky should be awarded a new trial on all issues.

CONCLUSION

Flying an airplane without a sufficient amount of fuel should constitute gross negligence or reckless conduct as a matter of law. This, along with the other conduct of the defendant, was in utter disregard of the rights of the plaintiffs. The Trial Court properly denied defendant's motions for a directed verdict and judgment notwithstanding the verdict.

The verdict and judgment in favor of Bette Schiewe

should be affirmed and Ralph Schiewe and Janice Nechanicky should be granted a new trial against the defendant on the issue of damages.

Respectfully submitted,

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CERTIFICATE OF COUNCIL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney